Supreme Court, U.S.
FILED
MAY 6 1998
CLERK

(3)

No. 98-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ERNST & YOUNG, a Canadian Partnership of Chartered Accountants, *Petitioner,*

vs.

THE COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, *Respondent.*

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DANIEL F. KOLB *
JEROME G. SNIDER
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

JOHN A. CHANDLER
ELIZABETH V. TANIS
AMELIA TOY RUDOLPH
Sutherland, Asbill & Brennan LLP
999 Peachtree Street, N.E., Suite 2300
Atlanta, GA 30309-3996
(404) 853-8000

Attorneys for Petitioner
* Counsel of Record

May 6, 1998

MERRILL CORPORATION, (404) 237-0038

8 pp

No. 98-1589

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ERNST & YOUNG, a Canadian Partnership
of Chartered Accountants, *Petitioner*,

v.

THE COMMISSIONER OF INSURANCE
OF THE STATE OF MICHIGAN, *Respondent*.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's theory — as clearly set out in his papers and as adopted by the Michigan Court of Appeals — is that E&Y-Canada is subject to suit in Michigan, notwithstanding the professional restrictions on its practice that preclude it from practicing public accountancy in Michigan, because E&Y-Canada allegedly "knew" or was aware that its audit opinions issued to its Canadian client in Canada under Canadian rules would be forwarded by its client into Michigan (and other jurisdictions) and relied upon by third parties there. (Resp. Br. at 6 (citing App. at C-24).) In the eyes of Respondent and the Michigan Court of Appeals, the "purposeful availment" requirement for personal jurisdiction is thus satisfied by evidence of the defendant's "knowledge" or "awareness" of potential impact within the forum, with nothing more as a purported minimum contact.

The Michigan Court of Appeals' holding represents one side of a long-standing divergence of opinion among the lower courts (and, as to another area of practice, this Court) concerning whether the "purposeful availment" standard contemplates that foreign professionals who render intangible services outside the forum to foreign clients choosing to do business in the forum may themselves be subject to suit in the forum based upon their "knowledge" or "awareness" rather than upon their affirmative or "purposeful" conduct. Respondent's arguments demonstrate the need for this Court to provide much-needed guidance and clarification on the appropriate standard to assert personal jurisdiction over foreign professionals providing intangible services *outside* the forum to foreign clients that unilaterally choose to do business *inside* the forum. If the Michigan Court of Appeals' holding is correct, a professional may be liable in countless jurisdictions where he or she is not licensed to practice and has never set foot, because of an awareness that his or her opinion or advice will — due to the acts of another — have an effect in the jurisdiction.

Eleven years have passed since the Court last attempted to provide a workable definition of purposeful availment. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, the plurality sought to clarify whether, in a products liability context, a foreign manufacturer purposefully avails itself of a particular forum state if it is aware that, after the sale of its product to another foreign entity, some of its product will be distributed into the forum state. The plurality concluded that without additional conduct by the manufacturer indicating its intent or purpose to serve the market for its product in that forum, a manufacturer's mere "awareness" that its product may or will be sold in the forum does not constitute purposeful availment. *Asahi*, 480 U.S. at 112. Four justices, however, disagreed with the plurality, arguing that when a manufacturer is aware that a chain of distribution (as opposed to a consumer)

will carry its product into the forum state, that awareness may be sufficient for minimum contacts purposes. *Id.* at 120 (Brennan, J., concurring in part) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 306-07 (1980) (describing *World-Wide Volkswagen* majority opinion as distinguishing cases "involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there")).

Although the *Asahi* plurality's holding has been treated by many courts as the guiding opinion in the products liability context, courts have separately diverged on the meaning and application of the "purposeful availment" standard when the defendant is a nonresident professional rendering intangible services outside the forum, the benefits of which follow the client into the forum. One school of thought, adopted by the Fifth, Ninth and Eleventh Circuits and the Michigan Court of Appeals in this case, is that the mere act of rendering professional services outside the forum to a client residing or doing business in the forum manifests that firm's own intent to serve the forum state — even when the firm, due to professional restrictions, does not and cannot have any other contact or connection with the forum. (Pet. at 21-22.)

By contrast, the First, Second, Fourth, Sixth, and Eighth Circuits have concluded that without additional, purposeful acts by the professional firm indicating the firm's intent to satisfy its own business goals in the forum rather than those of its client, the mere "awareness" that a client may or will carry the product of the firm's professional services into the forum is not enough to constitute purposeful availment of the forum within the meaning of the Due Process Clause. (Pet. at 16-21.)

Respondent's attempt to reconcile these diverging schools of thought is unavailing and confirms that in this important area

of constitutional due process, similar facts yield vastly different results, depending upon no more than the forum in which the professional happens to be sued. Respondent contends that the Fifth, Ninth, and Eleventh Circuits were presented with cases in which the nonresident professionals "were *aware* that their actions could have a substantial effect in the forum state" (Resp. Br. at 11 (emphasis added)). All of the cases described in the Petition, however, involved nonresident professionals who were *aware* that their actions could have a substantial effect in the forum state; such awareness logically flows from the professional's knowledge of its client's business plans or state of residence, and of the corresponding likelihood that the client would, to serve its own business goals, decide to direct into the forum state the product of the professional services rendered to it elsewhere. (Pet. at 16-21.) In all of these cases, it was also undisputed that the nonresident professional had no direct contacts with the forum apart from those ancillary to the out-of-state client relationship. Yet, in some instances, the professional's awareness was deemed sufficient to support personal jurisdiction without additional contacts and in other instances it was not.

The majority and dissenting opinions in the court below mark precisely the same point of divergence: whether, when the Due Process clause requires "*purposeful* availment" of the forum, "awareness" of potential effect within the forum is sufficient. The facts, as evidenced in the record, relied upon by the Court of Appeals, and conceded by Respondent, show that E&Y-Canada committed no acts in Michigan and has no connection with Michigan apart from the fact that it rendered accounting services in Canada to a Canadian client, CLIC, that had chosen to do business in Michigan and throughout the

United States.[1] The sole basis for the court's ruling, therefore, is E&Y-Canada's "awareness" of its client's connection to Michigan and the likelihood that the product of its services rendered in Canada — the audit opinion — would be forwarded by CLIC to Michigan, among other places, and relied upon in those locations. Respondent points to nothing else.

Respondent contends that this case is "unique" because it involves a state insurance code. The Michigan Insurance Code is only relevant to this Petition insofar as it explains how a Canadian audit report prepared in Canada under Canadian rules by a Canadian accounting firm for a Canadian insurance company came to be forwarded into Michigan by that insurance company. Otherwise, it has no impact on the minimum contacts analysis applied by Respondent or the Michigan Court of Appeals. The Michigan Insurance Code accords no special weight to the identity of the plaintiff as an insurance commissioner who expressly represents the interests of CLIC's policyholders (who, in a mutual insurance company, are the equivalent of shareholders of a corporation). If Respondent were correct that his identity as an insurance commissioner renders this case "unique," then the protections of the Due Process

---

[1] Respondent acknowledges that CLIC was licensed to transact business in Canada and the United Kingdom as well as every state in the United States, the District of Columbia and Puerto Rico, and that CLIC was subject to regulation and supervision in each of those jurisdictions. (Resp. Br. at 4.) CLIC, formerly the fourth largest insurance company in Canada, had numerous policyholders in each of those jurisdictions. Michigan was CLIC's state of entry into the United States and therefore was its primary regulator in this country, but Michigan was not CLIC's headquarters or principal place of business in the United States; rather, CLIC's United States headquarters were in Atlanta, Georgia. Respondent acknowledges that E&Y-Canada's audit opinions on CLIC's consolidated financial statements were addressed to CLIC's Board of Directors and *all* of its policyholders. (Resp. Br. at 9.)

Clause would be rendered a dead letter solely because a state regulator is the plaintiff.

As Respondent acknowledges in a footnote (contrary to his assertions in the main text of his brief), the Michigan Insurance Code did not place any special or unique requirements on E&Y-Canada's audits of CLIC, nor did it require a commitment from E&Y-Canada to express its audit opinion in conformity with Michigan law. (Resp. Br. at 4 n.5 (citing Mich. Comp. Laws § 1025(2)). Rather, Canadian laws, rules, and accounting procedures governed the performance of E&Y-Canada's accounting and auditing services.

The plain fact is that, if correct, the holding of the Michigan Court of Appeals would apply in any case where the professional could be shown to be aware that its advice would be relied upon in a distant forum. There would be no reason why the awareness would need to be established by a writing such as the awareness letter in this case. In any event, E&Y-Canada was aware in this instance that its client would forward its audit opinions to many places, not just Michigan.

This Court has held on multiple occasions that the Due Process Clause requires a degree of predictability to the personal jurisdiction analysis "that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). That degree of predictability, which necessarily is based on uniformity of treatment from jurisdiction to jurisdiction, is lacking for nonresident professionals under the current confused state of the law. E&Y-Canada respectfully requests that this Court grant its Petition for a Writ of Certiorari to clarify how the "purposeful availment" standard should be applied to

nonresident professionals providing intangible services to multistate or multinational clients.

Respectfully submitted,

DANIEL F. KOLB *
JEROME G. SNIDER
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

JOHN A. CHANDLER
ELIZABETH V. TANIS
AMELIA TOY RUDOLPH
Sutherland, Asbill & Brennan LLP
999 Peachtree Street, N.E., Suite 2300
Atlanta, GA 30309-3996
(404) 853-8000

Attorneys for Petitioner
* Counsel of Record

May 6, 1998